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1953

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 214

UNITED STATES OF AMERICA, PETITIONER

v.

JUDITH COPLON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit (R. 78) ordering a new trial for respondent if, at a hearing before the District Court, it appears that any telephone conversations between her and her counsel, irrespective of their content, were intercepted by Government agents.

OPINION BELOW

The opinion of the Court of Appeals (R. 60–77) is not yet reported. The opinion of the District Court denying respondent's motion for a new trial (R. 53–58) is reported at 91 F. Supp. 867.

JURISDICTION

The judgment of the Court of Appeals was entered June 1, 1950 (R. 78), and respondents petition for a rehearing and for a modification of the judgment was denied June 29, 1951 (R. 79).[1] the jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether the fact that Government agents intercepted some telephone calls between respondent and her counsel before and during trial entitles respondent to a new trial irrespective of the nature of the conversations overheard or of whether such interceptions prejudiced the respondent.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defence.

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[1] Although respondent's petition for a rehearing seemingly extended the Government's time to petition for certiorari as well as respondent's (*United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 177; *Johnson* v. *Eisentrager*, 339 U. S. 763), out of an abundance of caution we secured from the Chief Justice, in June, 1951, an extension of the time for filing this petition until July 31, 1951.

Section 605 of the Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1103 (47 U. S. C. 605), provides in pertinent part:

> * * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * *.

STATEMENT

Respondent, a former employee of the Department of Justice, was convicted in the District Court for the District of Columbia on a two-count indictment charging (1) that she copied and obtained intelligence reports of the Department of Justice relating to espionage activities, with intent and reason to believe that the information would be used to the advantage of a foreign power, in violation of 18 U. S. C. 793, and (2) that she removed from the Department of Justice summaries of F. B. I. reports relating to counter-espionage activities, in violation of 18 U. S. C. 2071. She was sentenced to imprisonment for 10 years on the first count and 3 years on the second, the sentences to run concurrently (R. 61).

Respondent's conviction was based on the same facts as those involved in No. 4, now before this Court on the Government's petition for certiorari to review the judgment of the Court of Appeals

for the Second Circuit, reversing respondent's conviction of espionage and conspiracy with one Gubitchev, a Russian national, to violate 18 U. S. C. 793 and 2071. 195 F. 2d 629. In brief, the evidence established that respondent was arrested on March 4, 1949, after she had been observed meeting, separating from, and rejoining Gubitchev in a manner which suggested that they were trying to avoid surveillance in an attempt to pass documents. In her purse, which was searched at the time of her arrest, were found a summary of an F. B. I. report relating to the Russian Trading Corporation, AMTORG, which had been described to respondent by her superior as "hot and interesting"; abstracts of F. B. I. reports relating to persons suspected of acting on behalf of the Soviet Union; and a typed statement to the effect that she had been unable to obtain access to a top secret report on espionage activities. There was other evidence that respondent had made efforts to obtain access to reports relating to Soviet agents when they no longer came before her in the course of her duties, and that she had had prior meetings with Gubitchev. See opinion below (R. 61–64).

Respondent moved to suppress the evidence obtained in the search of her purse on the ground that her arrest without a warrant by agents of the F. B. I. was unlawful. The District Court denied the motion. In affirming the conviction,

the Court of Appeals for the District of Columbia Circuit refused to follow the intervening ruling of the Court of Appeals for the Second Circuit in the New York case to the effect that F. B. I. agents had no authority to arrest without a warrant, even for a felony committed in their presence, unless they had reason to believe that the person they had arrested was about to escape.

Respondent was convicted in the District of Columbia prior to her trial and conviction in New York. While her appeal from the conviction in the District of Columbia was pending, she moved for a new trial in the District Court, presenting to that court by affidavit some of the evidence relating to wire tapping by Government agents which had been developed at a pretrial hearing in the New York case (R. 1–18, 20–42). The District Court denied the motion for a new trial, holding, as had the District Court in New York,[2] that the Government's evidence of respondent's guilt was obtained independently of the wire tapping (R. 53–58). On respondent's separate appeal from the order denying the motion for a new

[2] The opinion of the District Court for the Southern District of New York on the wire-tapping issue is reported at 88 F. Supp. 921. The Court of Appeals for the Second Circuit held that the District Court had committed error in failing to make available to the defense some of the wire-tapping records offered by the Government, which the judge withheld after he had examined them *in camera* on the ground that disclosure would be detrimental to national security. See 185 F. 2d 629.

trial, the Court of Appeals for the District of Columbia Circuit sustained this ruling of the District Court. A majority of the Court of Appeals, however, held that, in view of respondent's allegations that F. B. I. agents had intercepted telephone conversations between her and her counsel before and during her trial in the District of Columbia, a further hearing on that issue was necessary; and that, if it should be established upon such hearing that such interceptions of conversations with counsel had been made, respondent is entitled to a new trial on the ground that she had been denied her constitutional right to the effective assistance of counsel, regardless of the nature of the conversations overheard or the degree of prejudice resulting therefrom (R. 75–76). Judge Proctor dissented from this portion of the decision, expressing the view that it was evident from the record that neither respondent nor her counsel had been in any way handicapped in the conduct of her defense. He added that, if a hearing in the District Court should be deemed necessary, the question before that court should be to determine whether respondent had been deprived of the full aid of counsel, and that a new trial should be ordered only if such deprivation were established (R. 76–77).

The Government petitions for certiorari to review that part of the judgment of the Court of Appeals which holds that respondent is auto-

matically entitled to a new trial on a showing that telephone calls between her and her counsel were intercepted, irrespective of the nature of the conversations overheard. The Government would not object to a hearing under instructions that a new trial should not be granted unless the interception of such calls was prejudicial to respondent.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals for the District of Columbia Circuit affirming respondent's conviction in this case conflicts with the decision of the Court of Appeals for the Second Circuit, from which the Government has petitioned for certiorari in No. 4. Respondent has indicated in her petition for rehearing in the Court of Appeals for the District of Columbia Circuit that she will petition for certiorari in the event of denial of that petition. Petition for Rehearing, p. 14. Although the opinion of the Second Circuit did not refer to the issue raised as to the interception of telephone calls with respondent's counsel, respondent is certain to raise it in this Court in support of that court's judgment if the Government's petition in the New York case is granted. Since the same issue will be before this Court in the New York case, we submit that the Court should consent to review the point in the District of Columbia case as well. For if this Court should hold in the New York

case that such interceptions do not violate constitutional rights unless prejudicial, the Government would be entitled to a reversal of that portion of the decision of the Court of Appeals for the District of Columbia Circuit. This right can be protected only if this petition for certiorari be granted.

2. Respondent was an espionage agent, detected while she was currently engaged in her traitorous activities. Faced with that circumstance, the Government agents in charge of counter-espionage tapped her wires—not those of her counsel,[3] and continued to do so after her arrest. As an incident to such surveillance, they overheard conversations between respondent and her counsel. The question is whether that circumstance, in and of itself, so impaired respondent's constitutional right to the effective assistance of counsel that she is automatically entitled to a new trial, irrespective of the nature of the conversations overheard, or whether any prejudice resulted therefrom. As stated above, the court below found that the evidence against respondent was obtained independently of wire tapping.

[3] There is no allegation that counsel's wires were tapped. The affidavit of Howard B. Fletcher, submitted by the Government in opposition to the motion for a new trial, states that the only telephone taps or microphone surveillance installed or maintained were at the Gubitchev residence, and at respondent's office and residence in Washington and her family residence in New York (R. 44–45). See also 88 F. Supp. 921, 925.

We submit that the majority of the court below erred in holding that the mere fact of interception automatically resulted in a denial of respondent's right to counsel, even though nothing of substance may have been overheard. It is not alleged that respondent was, by reason of the interceptions, denied the actual assistance of counsel nor the opportunity for private consultation with counsel, but that the interception rendered such assistance ineffective.[4] The issue must therefore be whether the interceptions did in fact impair the effectiveness of her counsel's assistance. By its very nature, such a question cannot be determined by any absolute rule, but must depend on all the surrounding facts. If the agents overheard only calls in which the parties "refrained from discussing matters of any importance" to the trial, as the New York District Court held,[5] and thus did not assist the Gov-

[4] The cases relied on by the court below (R. 72–74) all involved situations where the defendant was deprived of any opportunity privately to consult with counsel or was deprived of the opportunity for consultation at such a critical stage that prejudice could readily be presumed.

[5] In its opinion with respect to the wire-tapping issue on the pretrial hearing, the District Court for the Southern District of New York found as follows, 88 F. Supp. 926:

"* * * Conversations between this defendant and her attorney were intercepted on defendant's wire, but it is apparent that at such times they were suspicious that the circuit was being tapped and consequently they refrained from discussing matters of any importance. (At least as early as March 16, 1949, the attorney was heard on the telephone express his suspicions of this.)"

ernment's case or in any way prejudice respondent's defense, there would have been no impairment of the right to counsel. If, on the other hand, the Government thereby obtained such advance knowledge of the defense tactics as prevented an effective defense, then respondent would be entitled to a new trial. Between these extremes all degrees of variation are possible, the legal effect of which can be determined only after a full hearing to establish the facts.

The situation here involved is not essentially different from that presented by a claim that denial of a continuance has impaired the right to effective assistance of counsel. This Court has held that such a denial may or may not have the claimed effect, depending on all the circumstances of the particular case. *Avery* v. *Alabama,* 308 U. S. 444; see also *Powell* v. *Alabama,* 287 U. S. 45; *Ex Parte Hawk,* 321 U. S. 114, 115–116. We submit that the same reasoning applies here.

In the ruling that any interception automatically requires a new trial, regardless of what was overheard, the court below has exceeded its function and has undertaken to penalize Government agents, rather than to assure a fair trial. That is not the duty of the court. As this Court said in *United States* v. *Mitchell,* 322 U. S. 65, 70–71, in holding that a confession was not inadmissible because of subsequent illegal detention

by Government agents, "Our duty in shaping rules of evidence relates to the propriety of admitting evidence. This power is not to be used as an indirect mode of disciplining misconduct." Similarly, in the situation here presented, it is the duty of the Court to make certain that respondent has had the full and effective assistance of counsel, a duty which can be fulfilled only by considering the actual facts relating to the interceptions. The power to assure a fair trial should not be used as an indirect mode of disciplining Government agents.

CONCLUSION

The conflict in decisions between the Court of Appeals for the District of Columbia Circuit and the Court of Appeals for the Second Circuit will, we assume, bring before this Court other aspects of the two *Coplon* cases, as well as the question presented here by way of support of the Second Circuit's judgment. In the circumstances, it is appropriate that this Court bring all aspects of these important cases before it. Accordingly, for the reasons herein set forth, it is respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

JULY 1951.

U. S. GOVERNMENT PRINTING OFFICE: 1951

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 214

UNITED STATES OF AMERICA,

Petitioner,

v.

JUDITH COPLON.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR RESPONDENT IN OPPOSITION

LEONARD B. BOUDIN,
Attorney for Respondent.

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MEMORANDUM FOR RESPONDENT IN OPPOSITION

Opinion Below

The opinion of the Court of Appeals (R. 60-77) is not yet reported. The opinion of the District Court denying respondent's motion for a new trial (R. 53-58) is reported at 91 F. Supp. 867.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Question Presented

Whether wire-tapping by the Federal Bureau of Investigation of respondent's telephone conversations with her

attorney before and during the trial below was not an interference with respondent's right to counsel under the Sixth Amendment and her right to a fair trial under the Fifth and Sixth Amendments to the Constitution where the contents of such conversations were revealed to Government trial counsel.

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the Constitution provides in pertinent part:

> "* * * nor shall any person * * * be deprived of life, liberty or property, without due process of law; * * *"

The Sixth Amendment to the Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defense."

Section 605 of the Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1103 (47 U. S. C. 605), provides in pertinent part:

> "* * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * *."

Statement

On March 10, 1949 respondent was indicted for a violation of 18 U. S. C. A. 793 and 2071 (R. 2). Her trial in the District Court for the District of Columbia commenced on April 25, 1949, and continued until June 30, 1949, at which time she was convicted (R. 3).

During the course of the trial respondent sought to discover whether the Government had engaged in wire-tapping of her telephones (R. 4, 28-29). Government trial counsel evaded and obstructed such inquiries (R. 4, 6, 29) or responded by characterizing them as "purely a fishing expedition" (R. 5) and "belief and speculation" (R. 29). FBI agents testifying for the Government likewise concealed or denied under oath any knowledge of such wire-tapping (R. 30, 32). Government counsel were silent during the testimony of these witnesses (R. 34-35). Finally, in the course of summation to the jury, Government trial counsel referred to the respondent's fear of wire-tapping as proof of a "consciousness of guilt" (R. 29).

During the pendency of the appeal herein to the court below, a pre-trial hearing was held in New York under a related indictment against respondent herein (R. 7-10). This revealed the following facts, squarely at variance with the Government's position in the trial below: At the personal direction of the Attorney General, respondent's telephones were tapped continuously from January 7, 1949 to November 10, 1949 (R. 22). (See *United States* v. *Coplon*, 185 F. 2d 629, 636 (C. A. 2, 1950), petition for cert. pending, Oct. Term, 1951, No. 4.) Forty-six special agents and employees of the Department intercepted all telephone conversations with respondent (R. 22). The conversations were recorded on discs, and in addition the agents equipped with hearing devices made handwritten notes of the conversations. The contents of the discs and the notes were transcribed, embodied in formal investigative reports and read by the Government trial counsel (R. 24, 29-30). Petitioner's illegal wire-tapping included the interception, recording and transmission of telephone conversations between respondent and her attorney (R. 10, 13, 14, 16). These invasions of the attorney-client privilege occurred prior to and during the trial below. The conversations related to the trial itself and included discussions about prospective witnesses and whether respondent and her mother would testify (R. 88).

The existence and content of the wire-tapping were known to the prosecution during the trial (R. 22-23). Its principal trial counsel read the investigative reports which summarized the wire-tapping information (R. 30); they interviewed FBI agents, their witnesses, who had either engaged in wire-tapping or had read the wire-tap records (R. 22, 23, 29, 30, 34, 35) and who then perjuriously asserted ignorance on the subject (R. 30-32). Their chief trial assistant and liaison with the FBI (R. 31) summarized this wire-tap data for the Government trial counsel in investigative reports (R. 10-12, 24, 31).

Full revelation of the extent of this wire-tapping of the conversations between attorney and client and any estimate of the use to which it was put by the prosecution is now impossible, for on November 7, 1949 the Assistant Director of the FBI ordered that the New York wire-tap records be destroyed "in view of the imminency" of respondent's New York trial (R. 33-34). Consequently, the Government has made much of this material no longer available for examination by this Court (R. 33-34).

The foregoing facts constituted one aspect of respondent's motion for a new trial in the District Court. The District Court denied respondent's motion on the ground that whatever might be the "ethical wrong" (R. 56) in the prosecution's wire-tapping of defense conversations, the respondent had a duty of showing a connection between the Government's evidence and such wire-tapping (R. 57). The Court of Appeals, reversing, held that this invasion of the attorney-client privilege was in violation of the respondent's rights under the Fifth and Sixth Amendments (R. 74). It remanded the matter for a hearing to determine whether such wire-tapping had in fact occurred, ordering a new trial if the answer were in the affirmative (R. 76).

Argument

1. There is no conflict of decision or other consideration under Rule 38 justifying review by this Court. Both the court below and the Court of Appeals for the Second Circuit have taken action favorable to this respondent, although for different reasons, by reason of the Government's illegal wire-tapping operations. The decisions upon which the court below relied in holding that respondent was denied a fair trial and the right to counsel (R. 71-75) represent the settled law. The decision of the court below follows the principles enunciated by this Court in *Glasser* v. *United States*, 315 U. S. 60, 76 (1942).

2. Consequently the Government seeks review on the hypothesis that the issue arising from the wire-tapping of counsel will be raised by respondent if this Court grants certiorari in No. 4 (Petition, p. 7). To this there are two answers: First, for reasons which will be indicated in the memorandum in opposition to certiorari in No. 4, we believe that certiorari should be denied in that case. Secondly, if certiorari in No. 4 were granted, that case could be disposed of with finality by a ruling that the arrest was illegal, as held by the Court of Appeals for the Second Circuit. Further, the wire-tapping issue itself in No. 4 can be resolved by affirming the ruling therein that respondent was improperly denied the right to examine all the wire-tap records.

3. Petitioner asserts that the evidence against respondent was obtained independently of wire-tapping (Petition, p. 8). This is a matter of grave dispute not yet resolved. Neither the District Court nor the court below had the wire-tapping records in its possession (see R. 23, 58); therefore the court below was in no position to reach this conclusion. The Court of Appeals for the Second Cir-

cuit, which did have the full wire-tapping records before it held that the respondent was improperly precluded from a complete examination of them (*United States* v. *Coplon, supra*). In any event, petitioner's point is irrelevant. The decision below is not based upon the statutory rule enforced in *Nardone* v. *United States*, 308 U. S. 338, but upon the constitutional right to counsel and a fair trial.

4. Petitioner's principal argument is that respondent should be required to prove that the Government's illegal interception of conversations between respondent and her attorney "did in fact impair the effectiveness" of the latter (Petition, p. 9). This argument is inapplicable to the particular facts in this case, incorrect as a matter of law, and is contrary to public policy and the administration of justice.

(a) A defendant cannot know everything that the prosecution overheard. The extent of her knowledge depends upon whether (1) all the wire-tappers made complete recordings of all conversations overheard, and (2) delivered all such records to the court.

Since it is rarely possible for a defendant to determine that either condition was fulfilled, the burden proposed is improper. In the present case, the Government could not deliver all of its records to the court because it had destroyed them for fear of revelation (R. 33-34). Therefore, petitioner has prevented respondent from revealing the full effect upon the right to counsel of the illegal wire-tapping. Certainly she should not be penalized for this additional wrongdoing by the prosecution.

Despite the handicaps described above, the undestroyed and revealed evidence in this case does show wire-tapping of privileged matter of critical importance. Thus, the record below reveals that the Government learned of defense counsel's plans and views of such critical matters as prospective witnesses (R. 13, 87-88).

(b) Even if the full content of the wire-tapped conversations between attorney and client were available, the degree of interference with the constitutional right to counsel is simply not ascertainable. The victim of wire-tapping cannot ever know what value the prosecution derived from its listening post at the counsel table. Nor can a court determine the full use made by a law-breaking prosecutor of any particular discovery, *e.g.*, that certain persons may or may not testify, which prospective Government witnesses give concern to defense counsel, or the latter's plan to make certain arguments or motions. Surely the Government does not propose a cross-examination of its own counsel with respect to his intellectual processes and tactics and a study of his trial notes. Yet this is the inescapable result of the Government thesis that specific injury must be proven.

5. Petitioner attempts to analogize its conduct herein with cases involving a denial of continuance (Petition, p. 10). There is a vast difference between the two types of cases. Since one does not have a right to a continuance under all circumstances its denial is not a violation *per se* of the Fifth and Sixth Amendments. But one does have an absolute right to consult his counsel in private (*United States* v. *Venuto*, 182 F. (2d) 519 (C. A. 3, 1950; *Yung* v. *Coleman*, 5 F. Supp. 702 (S. D. Idaho, 1934)).* As this Court has said: "* * * The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." (*Glasser* v. *United States*, *supra.*)

6. Respondent has plainly been denied a fair trial and the right to counsel, in violation of the Fifth and Sixth Amendments to the Constitution. Surely she is entitled to an opportunity to defend herself from the grave charges

* See other cases relied on by the court below at R. 73-75.

against her in a trial unsullied by the prosecution's misconduct and interference with fundamental rights. The petition for certiorari represents a final effort to deny her these rights.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

LEONARD B. BOUDIN,
Attorney for Respondent.

September 11, 1951.